In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1516

RUFUS EAFIE HARRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the Middle District of Alabama of conspiracy to violate the Internal Revenue laws relating to distilled spirits and was sentenced to imprisonment for 30 months. The court of appeals affirmed, one judge dissenting.

The sole issue is whether the trial court's charge on entrapment, (set forth in the opinion below at Pet. App. A-3 to A-4) adequately explained to the jury that the government had to prove beyond a reasonable doubt that there had been no unlawful entrapment in this case. The majority below properly held

that it did. The trial judge explicitly told the jury that "[t]he burden of proof in this case is on the Government to prove that there was no unlawful or illegal entrapment, and to do that, as they are required to do other things, to do it with the evidence beyond a reasonable doubt" (Pet. App. A-3). As the court below stated, there was no need to repeat that statement when he thereafter correctly explained the nature of entrapment (Pet. App. A-7).

Contrary to the view of the dissenting judge below, the instruction in this case was clearer than that in *Notaro* v. *United States*, 363 F. 2d 169 (C.A. 9). In *Notaro*, the initial portion of the instruction made only a passing allusion to the reasonable doubt standard; it was the lack of clarity and the lack of balance between the first and second parts of the *Notaro* entrapment charge that led to reversal. In the present case, the initial instruction imposing the "reasonable doubt" burden of proof on the prosecution was stated clearly and directly, and there is no reason to believe that the jury did not fully understand it.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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[1] The court in *Notaro* was apparently influenced in its decision by the fact that the trial judge stated that, had it been up to him, he would have accepted the entrapment defense and acquitted the defendant. 363 F. 2d at 172.

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